The Cayman Islands Guest Lecture 2019

The Role of the Judge in the 21st Century

By Sir Scott Baker

1. It is an honour to have been invited to give this lecture and a great pleasure for Joy and I to escape the English winter and come to your lovely island.

2. The title of this talk is the role of the judge in the 21st century and some might say that his role in this century is no different from that in the 20th century, or indeed even the 19th century. He or she is there to try cases, resolve civil disputes between individuals or individuals and the state, or to preside over criminal trials. That, I suggest, is a simplistic view. My theme is that judges are nowadays required to make decisions and embark on extra-judicial exercises that they would never have been asked to do in the past. This has drawn them increasingly into the political arena. Is this a good thing?

3. The judge's conventional job is, and always has been, to decide what the law is. A Q.C, on behalf of the Bar, welcoming a new judge to the bench noted that the role of the judge was *"to hear and determine according to law."* He went on to observe that some judges hear but do not determine; other judges determine but do not hear and there is a third category who both hear and determine but not according to law. I am sure none of these are to be found in this jurisdiction.

4. Determining what the law is can be relatively straightforward in conventional territory. It involves interpretation of statutes and application or development of the common law. But to me the interesting question is where the boundary lies between what the judges can do and what is down to the politicians. Furthermore, who defines the boundary and who polices it. In a trailer to the Reith lectures to be given this spring by Lord Sumption we learn that he will argue that politicians have surrendered ground to the judges without always appreciating the wider implications. It will be interesting to learn what he has to say.

5. There are many rules about interpreting statutes and how to elicit the intention of Parliament and now is not the occasion to explore them. Suffice it to say that the judge's role in doing so has not varied much from the 20th or indeed the 19th Century. Throughout, the guidelines have been pretty clear. Some judges are, as always, more imaginative than others and there are appellate courts to correct errors.

6. Developing the common law is, however, a rather different kettle of fish. In 2005 Lord Nicholls said this in *National Westminster Bank v Spectrum Plus* [1]

> *"The common law is judge made law. For centuries judges have been charged with the responsibility of keeping this law abreast of current social conditions and expectations. That is still the position. Continuing but limited development of the common law in this fashion is an integral part of the constitutional function of the judiciary. Had the judges not discharged this responsibility, the common law would be the same now as it was in the reign of King Henry ll. It is because of this that the common law is a living instrument of law, reacting to new events and ideas, and so providing the citizens of this country with a system of practical justice relevant to the times in which they live."*

Lord Nicholls did not, however, mention the limits of the judges' power to develop the common law. That issue had cropped up in *Woolwich Equitable Building Society v Inland Revenue Commissioners*[2]. The question was whether the longstanding rule that there was no right of recovery of money paid under a mistake of law in response to an *ultra vires* demand by a public authority could be changed. Lord Keith said the rule was too deeply embedded in English jurisprudence to be uprooted judicially. What was proposed was *"a very far reaching exercise of judicial legislation."* Lord Goff, who was in the majority for changing the rule, said that although he was well aware of the existence of the boundary he was never quite sure where to find it and its position seemed to vary from case to case. If it was as firmly and clearly defined as some would wish many leading cases would not have been decided in the way that they were.

7. There are numerous examples such as *Donoghue v Stevenson*[3] and *Hedley Byrne v Heller*[4] of judges developing the law appropriately. In *Pettit v Pettit*[5] Lord Reid distinguished between what he called lawyers' law, developing or accepting existing rules of common law to meet new conditions, and cases which directly affect the lives and interests of large sections of the community and which raise issues which are the subject of public controversy. In the latter laymen are as well able to decide the way forward as are lawyers and it is not for the court to proceed on its view of public policy for that would encroach on the province of Parliament.

8. Until relatively recently judges were inclined to be executive minded and avoid dipping into areas that affected the community at large or were the subject of public controversy. But things began to change in the latter half of the last century and now

[1] [2005] UKHL 41, para 32
[2] [1993] A.C.70.
[3] [1932] A.C.562
[4] [1964] A.C. 465
[5] [1970] A.C. 777

the pendulum has swung so that judges are much more likely to be criticised for being too interventionist than for supporting the government or the executive. What are the reasons for this? In my view there are several. First society is much more diverse than it used to be and minority groups are more vociferous. Second, judicial review has grown exponentially. Third there is the arrival of the Human Rights Act 1998. Fourth technology is advancing so fast in many areas that Parliament cannot keep up with the necessary legislation and much of what there is is delegated and inadequately thought through.

9. The number of judicial review cases has grown beyond all recognition. In the first half of the last century there was hardly a handful. Then the Crown Office list was created and this morphed into the Administrative Court where numerous judges now sit. Lord Brown, in a lecture in Hong Kong, attributed the rise in judicial review to none other than John McEnroe, the tennis player. You will remember that McEnroe loudly disputed line calls with expressions such as: *"You cannot be serious."* This was a challenge to the tennis authorities who in due course introduced hawk eye and accordingly more accurate, and therefore fairer, decisions. As McEnroe challenged the tennis authorities so the public became less prepared to accept decisions by public bodies. The grounds for challenging decisions by public bodies have been established since *Wednesbury* (*Associated Provincial Picture Houses Ltd v Wednesbury Corporation*[6]) as developed in later cases, in particular as explained by Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service*[7]. They are illegality, irrationality and procedural impropriety. That, incidentally, was a case in which the House of Lords held that, subject to certain exceptions, even the Royal Prerogative was subject to judicial review.

10. Judges have become more interventionist in deciding whether the decision under challenge was irrational, the test being that no reasonable decision-maker could have made it. That test does seem to me to import a not inconsiderable element of subjective judgment. If you don't like the decision it becomes very tempting to say that no reasonable decision-maker could have made it, a temptation that the judicial mind has to resist. I would suggest, however, that judicial review has improved the quality of decision making of public bodies as they have come to appreciate that it is necessary to take into account everything that ought to be taken into account and nothing that ought not to be taken into account, to reach a decision that is rational and, most importantly, to give reasons.

> *"I started my permanent judicial life as a judge of the Family Division. Cases at the cutting edge of the law were not that common in the Family Division in 1988 but, by chance, I was given one to decide within weeks of my appointment. This case went all*

[6] [1948] 1 K.B.223
[7] [1985] A.C. 374, 410

the way to the House of Lords and is a good example of permissible development of the common law by the judiciary. F was a 36 year old woman who had a serious mental disability and had been a voluntary patient at a mental hospital since she was 14. She developed a relationship with a fellow patient. Her mother and the medical staff were concerned that she could not cope with pregnancy or rearing a child and sought a declaration that it would be lawful for her to be sterilised. Other methods of contraception were not practicable. She was incapable of giving a valid consent because she did not appreciate the implications of the operation. Lord Goff pointed out that it was well established that operating on a person without his or her consent was unlawful and constituted the crime of battery and the tort of trespass to the person. It was common ground at all levels of the hearing that the court had no power to give consent on behalf of F or to dispense with the need for consent. How then could sterilisation be justified? The answer was that necessity proved the justification. Treatment was lawful if it was in the best interests of the patient. A reasonable body of medical opinion (the Bolam test) Bolam v Friern Hospital Management Committee[8] supported it, meaning that the doctors would be immune from liability in trespass as they were from liability in negligence, in re F (Mental Patient: Sterilisation)[9]. This case revealed the astonishing situation that there was no authority to justify sterilising someone in her situation when it was in her best interests to do so. Likewise, someone who was unable to consent having been rendered unconscious by, for example, an accident or a stroke had, for years and probably centuries been treated, without question, according to their perceived best interests.

11. The law soon moved further with a decision that life-sustaining treatment could be withheld from the dying, *in re C (a Minor): Wardship Medical Treatment*[10] and then that life-sustaining treatment could be withheld from a patient who was not dying, on the ground that he should be spared pain and suffering, *in re J*[11].

12. Then came the next seminal decision, *Airedale N.H.S. Trust v Bland*[12]. Bland was a 17 year old victim of the Hillsborough disaster. He had suffered devastating injuries and for over three and a half years was in a persistent vegetative state, totally unaware of the world around him. There was no hope of recovery or improvement of any

[8] [1957] 1 W.L.R. 582
[9] [1990] 2 A.C. 1.
[10] [1990] Fam 26
[11] [1991] Fam33
[12] [1993] A.C. 789

kind. The issue was whether artificial feeding and antibiotic drugs could lawfully be withheld from an insensate patient with no hope of recovery when it was known that if that was done the patient would shortly thereafter die. The High Court and Court of Appeal answered the question in the affirmative and this was upheld by the House of Lords. However, Lord Browne-Wilkinson said this:

> *"But behind the question of law lie moral, ethical, medical and practical issues of fundamental importance to society." As Hoffmann L.J. in the Court of Appeal has emphasised, the law regulating the termination of artificial life support being given to patients must, to be acceptable, reflect a moral attitude which society accepts. This has led judges into the consideration of the ethical and other non-legal problems raised by the ability to sustain life artificially which new medical technology has recently made possible.*
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> *But in my judgment in giving the legal answer to these questions judges are faced with a dilemma. The ability to sustain life artificially is of relatively recent origin. Existing law may not provide an acceptable answer to the new legal questions which it raises. Should judges seek to develop new law to meet a wholly new situation? Or is this a matter which lies outside the area of legitimate development of the law by judges and requires society, through the democratic expression of its views in Parliament, to reach its decisions on the underlying moral and practical problems and then reflect those decisions in legislation.*
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> *I have no doubt that it is for Parliament, not the courts, to decide the broader issues which this case raises. Until recently there was no doubt about what was life and what was death……..*
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> *Recent developments in medical science have fundamentally affected the previous certainties. In medicine, the cessation of breathing or of heartbeat is no longer death. By the use of a ventilator, lungs which in the unaided course of nature would have stopped breathing can be made to breathe, thereby sustaining the heartbeat. Those, like Anthony Bland, who would previously have died through inability to swallow food can be kept alive by artificial feeding……."*

13. He went on to say that these technical developments had raised a whole new series of ethical and social problems. What is *"life"* in terms of the sanctity of human life? Who is to decide, and according to what criteria; who is to live and who is to die?

What relevance have resource issues; and what of the timing of a death in terms of the rights of the parties?

14. His conclusion was that where a case raises wholly new moral and social issues it is not for the judge to seek to develop new, all embracing, principles of law in a way which reflects the individual judge's moral stance when society as a whole is substantially divided on the relevant moral issues. Parliament does not appear to have taken up the invitation although a House of Lords Select Committee did produce a report[13] rejecting any change in the law. Public pressure for a change in the law continues.

15. Meanwhile, a few years later the court was faced with another terrible dilemma. Could conjoined twins be separated against the wishes of their parents? The Court of Appeal in *Re A (Children)*[14] held that they could. Whilst one would die, the other could be expected to lead a relatively healthy life.

16. Issues relating to death have troubled the courts in other areas too. I refer in particular to assisted suicide. Suicide is no longer a crime in the United Kingdom, but aiding and abetting suicide is. There have been cases in which those with incurable conditions such as motor neurone disease and multiple sclerosis have wished to have assistance to take their own lives when they become unable to do so by their own hand. Dignitas is an organisation that facilitates this, not in the U.K, but in Switzerland where assisted suicide is not unlawful.

17. The first case to come to the attention of the English courts was *R (Pretty) v Director of Public Prosecutions and Ors*[15] Diane Pretty wished to enlist the support of her husband. He was willing to help, but only if he would not be prosecuted. The DPP refused to give such an undertaking. Mrs Pretty relied on the European Convention on Human Rights but the House of Lords held that she was not entitled to the undertaking that she sought.

18. This case was followed by that of Debbie Purdy who suffered from multiple sclerosis. I presided over a Divisional Court which rejected her claim, which was along similar lines to that of Diane Pretty. Our decision was upheld by the Chief Justice in the Court of Appeal. However, in the House of Lords, in its last ever decision before it became the Supreme Court, (*R (Purdy) v Director of Public Prosecutions),*[16] Mrs Purdy had some success. The House pointed out that Diane Pretty had never identified where she wished to end her life. That was not the case in *Purdy* who wished to go to Switzerland where, as in several other countries, assisted suicide is lawful. The House held in *Purdy* that article 8 was engaged. There had been doubts whether it

[13] (H.L. 21 -1 1994)
[14] [2001] Fam 149
[15] [2001] UKHL 61
[16] [2009] UKHL 45

was in *Pretty* and there was a difference of opinion between the House of Lords and the European Court of Human Rights.

19. The issue in *Purdy* turned on the fact that a prosecution for assisted suicide requires the consent of the DPP and the circumstances in which he would, or would not, give his consent. The House held that the guidelines for Crown prosecutors were not sufficient and the DPP needed to go further. The House allowed the appeal and required the Director to promulgate an offence-specific policy identifying the facts and circumstances which he would take into account in deciding, in a case such as that which Mrs Purdy's exemplified, whether or not to consent to a prosecution under the 1961 Act.

20. Interestingly, the issue in *Purdy* continues to arise in a number of sad and difficult cases. It is said that an average of one person a week travels from Britain to seek death at the Dignitas clinic in Switzerland. Earlier this month the case of Mr and Mrs Whaley attracted considerable media attention. He resolved, with his wife, to make one last journey, while he could, to Dignitas where he would be assisted by doctors to end his life. Following a tip-off, police interviewed Mr and Mrs Whaley. Could she risk helping her husband to travel to make this journey? There was the possibility of a criminal prosecution. As the law stands assisting suicide is a criminal offence punishable with imprisonment. Surely the law needs to distinguish between cases of compassionate assistance and those of malicious intent, but only by Parliament changing the law can this be achieved.

21. The decision in *Purdy* was undoubtedly a step forward in trying to clarify the circumstances in which the Director would give his consent for a prosecution, but the judges could only go so far. Two points arise. First it is unthinkable that the courts would have made such an order against the DPP even 50 years ago, before public bodies became amenable to judicial review in the way that they are today. Second, what the House left untouched was the underlying question of whether assisting suicide should remain a crime and, if so, in what circumstances. As recently as the 1st of this month the Times newspaper carried an article headed: *"Bitter dispute on assisted dying hits Royal College of Physicians."*

22. As the House was considering its judgment in *Purdy* there was a debate on the Coroners and Justice Bill, in which an amendment introduced by Lord Falconer enabling assistance to be given to people in Mrs Purdy's position to travel abroad was defeated by 194 votes to 141. It is difficult to see the judges advancing the law any further on this sensitive topic; the ball is firmly in Parliament's court. In 2015 MPs overwhelmingly rejected a Bill that would have allowed terminally ill patients with less than six months to live to be given assistance, with certain safeguards and restraints, to end their lives. On the 7th of this month there was a leading article in the Times newspaper calling for public policy to catch up with humanitarian need. Feelings run high in both directions and any legislation requires built in protections

to avoid the slippery slope to legalised euthanasia. If the politicians don't act there is a danger that at some point the judges will be tempted to cross the boundary into Parliament's territory.

23. The end of life seems to generate some very difficult questions for the courts and there have been several cases recently in which parents' wishes to try unapproved experimental treatment abroad have clashed with medical opinion as to the best interests of a terminally or desperately ill child. Should the judges be required to resolve such issues, or should Parliament decide in what circumstances, if any, the parents' wishes should prevail? That remains an open question. Can parents, in such circumstances, be better placed than medical experts to decide what is in the best interests of their child?

24. My thoughts turn from the end of life to the beginning of life. The advent of *in-vitro* fertilisation and surrogacy has created a host of new problems. In the mid 1980s I had the good fortune to be a member of the inter-departmental Warnock committee charged with making recommendations with regard to this new technology and the many questions that it raised. Baroness Warnock, then Dame Mary Warnock, whose incisive mind paved the way for the Human Fertilisation and Embryology Act 1990, was held by all in enormous regard The basic question on everybody's lips was: *"When does life begin?"* To which it would have been impossible to find a convincing answer. She quickly pointed out that the question was irrelevant to our deliberations. What mattered was the protection to be given to eggs, sperm and embryos and in what circumstances. I shall not embark on the issues the courts have and have had to consider in this area. Suffice it to say that Parliament cannot expect the judges to develop the law on their own. A framework of legislation is required to keep up with the rapidly developing technology. As Mary Warnock said:

> "*People generally want some principles or other to govern the development of the new techniques. There must be some barriers that are not crossed, some limits fixed beyond which people must not be allowed to go. A society which has no inhibiting limits in the areas of birth, death, the setting up of families and the valuing of human life would be a society without moral scruples and this nobody wants."*

25. There are other areas in which judges are nowadays called on to make decisions of great public importance – of much wider importance than just to individual litigants. First let me mention the well-known Brexit litigation. *R (Miller) v Secretary of State*

for Exiting the European Union and Ors[17]. The main issue was what steps were required by UK domestic law before the process of leaving the European Union could begin. Could formal notice of withdrawl be given by ministers without prior legislation passed by both Houses of Parliament and assented to by HM The Queen? No one suggested the issue was an inappropriate one for the courts to determine. As Lord Neuberger pointed out, some of the most important issues of law which the judges have to decide concern questions relating to the constitutional arrangements of the United Kingdom and that is what the appeal was about. It had nothing to do with the rights or wrongs of Brexit, the timetable or arrangements for withdrawl or the details of any future relationship with the European Union. Those were political issues for Ministers and Parliament to resolve.

26. Unfortunately some of the media, whether deliberately or not, misrepresented the position claiming that the judges were interfering in issues that were not for them, describing the judges in the Court of Appeal as: "*enemies of the people"* because they had held that prior legislation was required before notice of withdrawal could be given, a view with which a majority of the Supreme Court concurred. As Lord Neuberger said, the duty of the judges is to decide issues of law which are brought before them by individuals and entities exercising their rights of access to the courts in a democratic society. This case was an example of judges perfectly properly deciding issues in highly charged political territory.

27. Another example is a case I recently heard on appeal in Bermuda. *The Attorney-General for Bermuda v Ferguson and Ors*[18]. The issues were whether legislation banning same-sex marriage was invalid and whether it breached the Bermuda Constitution. When debating the Bill, the Minister said it was not a matter the Government was prepared to leave to another important arm of government, namely the judiciary; they had a solemn responsibility to pass laws giving effect to the position of the Government. It would not be appropriate for me to say anything about the *Ferguson* case beyond that which is in the judgment, because it is under appeal to the Privy Council. The Attorney-General lost in the Court of Appeal because the relevant piece of legislation was passed for a mainly religious purpose and also because it breached the Bermuda Constitution. I should explain that in a country with a secular constitution its Parliament cannot pass laws for a wholly or mainly religious purpose; nor can it pass laws that are inconsistent with the fundamental rights and freedoms of its constitution. It is for the courts to decide whether the boundary has been crossed. That decision becomes more difficult if there is doubt where the boundary lies.

28. Interpreting constitutions has increasingly brought modern judges into the area of political controversy. The United Kingdom does not have a written constitution – not

[17] [2017] UKSC 5
[18] Civil Appeal Nos 11 and 12 of 2018

yet at any rate – so the same issues do not apply as they do in countries like Bermuda and Cayman that do have one. Lord Hoffmann observed in *Matadeen v Pointu*[19] that the background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values and that interpretation must take these matters into account. However, the courts cannot ignore how society has moved on since the constitution was enacted and, as Lord Bingham said in *Reyes v R,*[20]

> *"A generous and purposive interpretation is to be given to constitutional provisions protecting human rights. The court has no licence to read its own predilections and moral values into the constitution, but is required to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of an evolving society."*

29. Whilst same-sex marriage would not have been in the mind of the draughtsman of the Bermuda Constitution 50 years ago, we concluded, as did the trial judge, Kawaley C.J. that section 8 of the constitution was drafted to protect everyone's freedom of conscience in a changing world.

30. What conclusions do I draw from all this as to the role of the judge in the 21st century? First, the explosion of judicial review and then the incorporation of human rights into the law have required judges to make decisions in cases that would never previously have seen the light of day. The decisions of public authorities, right or wrong, would have been left unchallenged. This has inevitably brought the judges more into the public arena and made them more vulnerable to public criticism. Politicians and the executive do not like having their decisions challenged. They, and the media, are prone, from time to time, to make intemperate comments when they are. Judges are public servants and cannot reasonably object to their decisions and reasoning being criticised, provided that criticism does not become personal.

31. Whilst the decision-making of public authorities and not least the giving of reasons for their decisions, has undoubtedly improved in consequence of these challenges, judges have to be careful not to trespass over the line into making decisions on subjects that require proper political debate and analysis, such as aiding and abetting suicide which, as the law stands in the UK remains a criminal offence, whatever the circumstances.

[19] [1999] A.C. 98, 108
[20] [2002] 2 A.C. 335, para 26:

32. The other aspect of the judges' modern role on which I wish to touch is the increasing use made of the senior judiciary outside their customary role of trying cases and hearing appeals. Most of the current members of the English Court of Appeal have additional responsibilities, some, such as the chair of the Law Commission or the Investigatory Powers Commissioner, that take them full time, or virtually full time, away from sitting in court. 50 years ago, a person's administrative or organisational abilities had little, if any, relevance to his appointment as a judge. That is not so today. Increasingly judges and retired judges are asked to conduct inquiries into matters of political sensitivity. Perhaps most notorious is the Bloody Sunday inquiry which took Lord Saville, one of the finest brains of the post-war judges, away from sitting as a judge for many years. Recently there has been a further development in using judges to sit as coroners, in cases where the cause of deaths or many deaths has been a matter of great public concern.

33. I was the first to find myself in this position but I have been followed by a number of others, most notably Lady Justice Hallett with the London bombings and Sir John Goldring with the Hillsborough disaster. Inquests such as these have the attributes of a public inquiry but there is a difference in that, if the circumstances are such that the inquest warrants a judge rather than an ordinary coroner, it is very likely it will require a jury too. That was so in the inquests I conducted into the deaths of Diana Princess of Wales and Dodi al Fayed. The jury had to decide the facts, what evidence they accepted and what evidence they rejected. Unlike a public inquiry the proceedings took place in a court of law – a coroner's court.

34. In ordinary litigation the judge hears the witnesses and arguments presented to him by the parties. It is different with an inquest. It is for the coroner to decide what evidence he wishes to hear. In the inquests I conducted, there had been previous inquiries by the French and by Lord Stevens, the former Commissioner of Metropolitan Police. There was a vast number of documents to organise and witness statements to arrange. The case cried out for a document management system that could be accessed by those involved in the case, but at the same time was secure.

35. The administration required was considerable. One of my first tasks was to appoint a solicitor and secretary to the inquests. The public inquiry by Lord Hutton into the death of David Kelly, a former U.N. weapons inspector in Iraq, had recently concluded and I chose the same solicitor and secretary who had assisted him. This caused the Daily Mail to comment that since that inquiry had been a whitewash and the inquests into the deaths of Diana and Dodi were going to be a whitewash, I might as well have appointed a painter and decorator.

36. There were two other actions that occurred before the inquests started that require mention. The first was finding suitable accommodation. I managed to secure the biggest court in the Royal Courts of Justice complex but we needed an annexe to accommodate up to 300 press and public. We arranged an annexe to which the

proceedings were transmitted by audio and video. This was a semi-permanent structure in a quadrangle at the Royal Courts of Justice. It required planning permission. It struck me as odd that every time there is a public inquiry, or inquest of this nature, the Chairman has to start from scratch to find the necessary accommodation and staff and set up the appropriate document control and other systems. There ought to be a better way.

37. The second action that was necessary on my part was that I spent a number of days at Vauxhall Cross, the headquarters of the Secret Intelligence Service, or MI6 as it is known, in effect auditing a process that had been undertaken by the Metropolitan Police, to see if there was anything remotely sinister or suspicious. It will be recalled that Mohammed al Fayed's case was that the Secret Intelligence Service had murdered Diana and Dodi in a staged accident on the express instructions of the Duke of Edinburgh. His argument was based, in part, on something an errant member of the Secret Intelligence Service had once said which implied that MI6 did kill people and that they would shred or destroy documents to cover their tracks should the need arise. Unsurprisingly I found nothing of significance, nor was I refused access to anything I considered might possibly be relevant.

38. MI6 has been on a statutory basis since 1994. It is responsible to the Foreign Secretary. Its concerns are national security, the economic well-being of the United Kingdom and the prevention or detection of serious crime. It is overseen by the Intelligence and Security Commission of senior parliamentarians. It is also subject to judicial oversight. The starting point is that, like everyone else, it is subject to the constraints of the law and that applies to Crown servants abroad just as in this country.

39. By section 7 of the Intelligence Services Act 1994 the Secretary of State can give authorisation for acts that would otherwise be impermissible e. g. breaking in to premises or stealing something. Historically the policy of the security agencies has been not to confirm or deny any allegations, the rationale being that if you confirm or deny something once you create expectations in the future and it becomes difficult not to do it routinely. How were we to get evidence about MI6 before the jury? There was considerable reticence on their part to allow anyone to give evidence, but eventually they were persuaded to be more open and in my view the evidence we heard from them did them no harm and disposed of a number of myths. It explained how they had moved into the present age and operate the kind of systems one would expect to find in any well-run company.

40. You may ask why there was a jury. The answer lies in section 8 of the Coroners Act 1988. A jury is mandatory where the death occurs in prison, police custody, from an injury caused by a police officer or as the result of a notifiable accident, poisoning or disease – or – and this is the relevant category – the death occurred in circumstances

the continuance or possible recurrence of which is prejudicial to the public or any section of it.

41. I became involved in the inquests because Baroness Butler-Sloss, who was initially appointed to conduct them, had ruled that they should be heard without a jury by her alone, a decision that was overturned by the Divisional Court. She stood down as she felt that her expertise was in fields other than jury trials.

42. The hearings began at the start of October 2007 by which time the Judicial Communications Office had been hard at work. First, they set up a website for us, www.scott-bakerinquests.gsi.gov.uk. It was updated twice daily with transcripts of the evidence including the photographs and CCTV footage shown in court. The programme of anticipated witnesses for the week ahead was also on it. The idea was to maintain transparency and public confidence. One day we had just under 75,000 hits. Setting all this up seemed rather far removed from the traditional role of the judge.

43. The other thing the Judicial Communications Office did was to arrange for the whole inquest team and the jury to go to Paris so that the jury could view the scene. This was no small logistical exercise and only the second occasion on which an English jury had been taken abroad, and the first time for an inquest. It involved obtaining the cooperation of the French authorities and ensuring that the jurors were not compromised or hassled by the media. It also required ensuring that the jurors all had the relevant travel documents, itself a problem since the identity of the jurors was only known once the jury was selected at the start of the hearing.

44. When in Paris we all travelled by coach along the same fateful route that Diana and Dodi had taken on the night of the accident. I found myself standing with a microphone in one hand holding the luggage rack with the other and describing where we were. It occurred to me at the time that this was not what one would expect to be in the job description of an appeal court judge.

45. The purpose of an inquest is to ascertain who the deceased was and when, where and how the death occurred. The only issue for us was how they died, and it is up to the coroner to decide the ambit of the investigation and the witnesses to be called. The House of Lords has given a wide interpretation to this, pointing out that one of the purposes of an inquest is to confirm or allay suspicion. The inquest heard 268 witnesses over 89 sitting days, many of whom gave evidence by video link – a valuable tool since there was no power to compel a witness from abroad to give evidence. Video links were established in France, Germany, New Zealand, Australia, Nigeria, Kenya, Brazil and California. Time differences caused the inquest to sit on occasions very early in the morning and very late in the evening.

46. There was one lighter moment when a witness called Darren Lyons gave evidence by video link from Sydney. He was to be challenged as to why he had come into possession of photographs taken at the scene very soon after the accident. He was represented by an English Q.C. As the video camera honed in on the two of them in a Sydney video suite, they made an interesting contrast. There was the Q.C, Hugh Carlisle, who was smartly dressed in a dark three piece suit, despite a hot summer day and with immaculately brushed hair. Alongside him was his client, Darren Lyons, wearing jeans and a T shirt and with a Mohican hair cut with a bright orange stripe from front to back. Counsel for the inquest, introducing the witness began with the words: *"Just so the jury can be clear Mr Lyons, you are the gentleman on the left of the picture."*

47. In my venture as Assistant Deputy Coroner for Inner West London, to give me my correct title, I was the first of many judges to step into the coronial world. Indeed, nowadays a judge is permanently assigned to the role of Chief Coroner. High profile inquests conducted by a judge are sensitive investigations into circumstances where, usually multiple, deaths have caused great public concern. In his ordinary diet of trying cases the judge presides over an adversarial process but inquests, like public inquiries, are inquisitorial rather than adversarial, although at times the coroner has to remind the legal representatives of this.

48. One of the advantages from the Government's point of view in asking a judge to conduct a public inquiry is that it takes the heat off pressure to legislate to address what the media see as the causes of the disaster or the underlying issue. A problem kicked into the long grass becomes someone else's problem. A good example of this is the Grenfell Tower inquiry which the recently retired Lord Justice, Sir Martin Moore-Bick, is now conducting. Not only has it required considerable management and administrative skills to set up and run, it has also placed him in the public limelight and subjected him to a lot of unwarranted criticism from those who do not understand the purpose of appointing an independent person with judicial experience to conduct an inquiry of this nature.

49. What conclusions do I draw from all this? First, the modern judge is a very different animal from his predecessor. As Lord Pannick Q.C. pointed out in one of his recent articles in the Times, the judge has been transformed from George Orwell's description of a *"gouty old bully with his mind rooted in the 19th century handing out savage sentences"* whose prejudices would be altered by *"nothing short of dynamite"* to become a well-informed liberal jurist who decides judicial reviews and applies the Human Rights Act in a manner that can provoke outrage from Conservative Home Secretaries.

50. Many of the cases the modern judge has to decide fall close to the boundary between making the law, which is for the politicians, and interpreting it, which is for the judges. Where the law has been left untouched by the politicians, the judges

have been doing their best to interpret what there is in order to meet the needs of modern society, but there is a limit to what they can do. I suspect, like Lord Goff, supra, that many judges are aware of the boundary but are never quite sure where to find it and that it does vary from case to case, depending on how progressive or imaginative the judge is prepared to be. There are surprisingly few occasions on which appellate courts these days have said they are unable to develop the law because it is a matter for the politicians. Judicial ingenuity has usually prevailed to help a deserving litigant. The most obvious example where the politicians have to intervene is with the law on assisted suicide. There is no easy answer, but the existing state of the law is out of keeping with public opinion. They cannot forever duck the problem.

51. Second, the modern judge is used by the governments of the day to tackle issues to which there is no obvious solution and on which decisions can be postponed if there is a judicial investigation in the form of a public inquiry or inquest. Third, the modern judge is no longer just a judge in the conventional sense. He or she is expected to display administrative and organisational skills in managing cases. In short, the role of the judge has changed dramatically.

52. It has been my good fortune to sit in the Bermuda Court of Appeal with your Chief Justice, Anthony Smellie, a jurist of the highest order. It is clear to me that he heads a judiciary here that has all the skills and abilities to meet the challenges of the 21st century.

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